United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1476

TO BE ARGUED BY:

HELENA PICHEL SOLLEDER

B/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

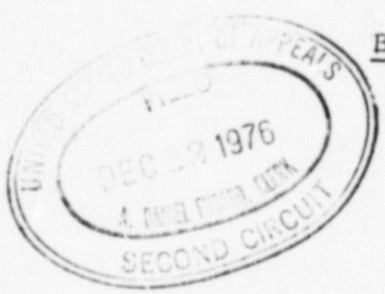
Docket No.
76 Cr. 1476

- against -

BRADLEY BRANNICK and BARBARA TIRA,

Defendants-Appellants

BRIEF FOR APPELLANT TIRA



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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, Docket No. 76-Cr.1476

Plaintiff-Appellee,

- against -

BRADLEY BRANNICK and BARBARA TIRA,

Defendants-Appellants

BRIEF FOR APPELLANT
BARBARA TIRA:

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

QUESTIONS PRESENTED:

1. Whether it was error for the Court to allow evidence of prior activities of the two conspirators Pierce and Brannick in 1972 and of Pierce, Brannick and Tira in 1973.

2. Whether it was error for the court to preclude the appellant, Tira, from having access to the Pre-Trial Service file of the witness Pierce for purposes of cross-examination.

STATEMENT OF CASE:

PRELIMINARY STATEMENT:

This is an appeal from a judgment of conviction entered in the District Court (Judge Neaher) on October 8, 1976 following a jury verdict of guilty of Counts 1, 4 and 5 of the indictment. The defendant was sentenced to a suspended sentence of one (1) year on each count to run concurrently plus two (2) years special parole and five (5) years probation. Appellant is presently on probation.

Co-defendant appellant BRANNICK was found guilty of all five (5) counts. A third defendant JEFF PIERCE pleaded guilty to the conspiracy count of the indictment and testified as the principal government witness.

The indictment filed April 13, 1976 charged all three defendants with a conspiracy entered into between April 4th and April 8, 1976 to import hashish oil (Count 1); and with knowing and intentional importation of such oil from Pakistan on the 4th and 8th days of April 1976 (Counts 2 and 4); and with knowing and intentional possession on the th and 8th days of April 1976 (Counts 3 and 5).

Defendant was acquitted of the possession and importation of hashish on April 4, 1976 (Counts 2 and 3).

B. STATEMENT OF FACTS

On the evening of April 8, 1976 at John F. Kennedy Airport appellant and co-defendant Brannick were arrested following the seizure by agents of Customs and the Drug Enforcement Administration of a suitcase which was found to contain a false bottom in which was secreted a qualtity of hashish oil. The suitcase had the name tag of defendant and had been picked up by her at the luggage carousel upon the arrival of her plane from Pakistan and presented by her for customs inspection. Acting on information from the co-defendant Pierce, who had been arrested four days before, under similar circumstances, Customs Agent Daly exained the bag and discovered the oil and notified Drug Enforcement Agent Trustey, both of whom placed defendant under arrest respectively.

Appellant denied knowledge of the contents of the bag and told the agents that the bag had been given to her in Pakistan by a Pakistani named Abdul who had also given her a half rupee note and who had told her that she would be contacted by Abdul or someone in his behalf who would have the other half of the rupee note as identification. A half rupee note was seized from defendant at the time of her arrest. (Tr. 28-37; 68-70; 404-07)*.

Four (4) days before on April 4, 1976 co-defendant Pierce had come in on a flight from Pakistan and a routine customs

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* Tr. refers to the trial transcript.

search of his valise had revealed a quantity of hashish oil. When arrested Pierce first told the agents that he was alone in the venture but the day following his arrest on the way to Court from the Municipal Correction Center upon being told by the agents that he could help them he, Pierce, told the agents that he had flown to/and been in Pakistan with Tira and Brannick and that it was arranged that he and Tira would return with suitcases provided by Brannick containing the oil but that Brannick and Tira were to follow Pierce on April 8, 1976. (Tr. 313-14; 317; 334-5; 476-80; 506). This statement of Pierce followed five days of being without sleep. A motion to suppress his statement was denied although counsel cross examined the witness on this aspect of his testimony. Pierce also testified at length about two prior trips he had made to Afghanistan in 1972 and 1973 at which time he had returned with hashish oil. The events surrounding these trips were as follows. He said that in 1972 he had met Brannick and another person not on trial, the witness Schuterman, that Brannick had offered him $10,000 to bring in some hashish oil which he Pierce, did accompanied by Schuterman in January of 1973. Appellant Tira was no part of this agreement or this earlier trip. However in July of 1973 Pierce testified that he returned to Pakistan with Brannick and Tira, a trip which he took following a phone call from Brannick asking him to make another trip; that he

first met Tira in the New York office of the Pakistan consulate where she had gone to obtain a visa. That the three of them travelled together and returned together. Although he testified as to various conversations both in person and on the telephone and correspondence with Brannick relating to these trips, there was no testimony whatsoever that Barbara Tira was ever party to any of these discussions. (Tr. 166-220; 231). He did say that on the second trip which took place in July of 1973 Tira told him that she was getting $6,000 from Brannick. On this trip the three of them returned with suitcases. Regarding the trip in 1976 which was the subject matter of the indictment his testimony was that following a meeting with Brannick at which appellant Tira was not present, he, Pierce, flew by himself to Pakistan where after spending 15 or 16 days alone he went to the Tribal Area where he first met Brannick and appellant Tira. This was the first time he had met Tira since 1973; that on this trip Brannick supplied both Pierce and Tira with suitcases but that he never saw the suitcase seized from appellant Tira opened, that he never saw oil in it; that he "assumed" she would be bringing in the oil because Brannick said he would not be (Tr. 220-233).

The witness identified the suitcase which had been seized from Tira on April 8, 1976 only after looking at the name tag and stated that he presumed it was the suitcase he had seen her with in the Tribal Area. At that time Brannick had taken the suitcases from appellant and Pierce and then returned them to him presumably filled with the oil. Pierce's testimony as to

this trip in 1976 was corroborated by the testimony of Brannick who said he was in the rug business and had gone to Pakistan and to Afghanistan to purchase rugs. He, Brannick, also testified that in 1973 at the time they were together in Afghanistan Tira and he, Brannick, were lovers. That she never carried oil on either occasion. He denied that they had travelled with Jeff Pierce in 1976. Pierce's testimony on this was conflicting.

The witness Schuterman who participated in the 1972 conversations and the first 1973 trip in January also testified and corroborated Pierce's testimony. (Tr. 363). He, Schuterman, had never met appellant Tira. In fact there was no testimony whatsoever that appellant Tira was ever present at any of the times the plans by Pierce were discussed between him, Brannick and Schuterman in 1972, 1973 or 1976.

Aside from the naked fact of appellant's possession of the suitcase at the airport on April 8, 1976 there was no direct proof that she knew the contents of the valise, there was no proof connecting her with the valise, no proof of how it had arrived at the airport of departure, of how the oil had been placed in it, of who had custody of it or access to it before it was placed on the plane, and there was the testimony that she had been separated from the valise for 22 hours before she claimed it.

After the seizure the usual tests were made and the government's expert testified that the sticky substance in plastic bags found in the false bottom of the valise picked up and presented by appellant Tira was in fact hashish oil.

ARGUMENT

POINT I

IT WAS ERROR FOR THE COURT TO PERMIT THE TESTIMONY OF CO-CONSPIRATOR PIERCE AND THE WITNESS SCHUTERMAN AS TO THE 1972-73 TRIPS.

Over counsel's objection the evidence of two prior trips undertaken by the co-conspirator Pierce in 1972 and 1973 was admitted on two theories - Federal Rules of Evidence 404 (b), and to show the background of the conspiracy in 1976 and the relationship between the witness Pierce and Brannick.

It appears that the Court recognized the hearsay aspect of the testimony of Pierce and Schuterman as to 1972 and January 1973, as well as it remoteness, because the Court instructed the jury to consider this testimony only as to the co-defendant Brannick (Tr.360).

The ruling while of some help to appellant was confusing in that the purpose of the evidence as to the activities of 1972 and 1973 was in order to establish the activities of Brannick and Pierce in 1976.

As to appellant, without proof of the 1973 trip, there was very little to show her participation in the 1976 conspiracy, other than the isolated act of her carrying the suitcase, which while it might prove possession, would not necessarily prove her a conspirator. In any event it was impossible for the jury to separate the 1972-73 transactions into two parts and disregard the first trip in January 1973 as to appellant while

considering the second trip in July of 1973. The ruling of the Court while of some help to appellant did not go far enough. As background for the conspiracy the evidence was too remote particularly in view of the fact that the indictment charged the instant conspiracy to have existed between April 4 and April 8, 1976. There was no proof whatsoever that after the single isolated encounter between Pierce and appellant in July of 1973, at a time when she and Brannick were lovers, appellant ever saw or communicated with Pierce until 1976 when the three of them met in the Tribal Area.

At best the evidence tended to show the existence of two separate conspiracies, one between Pierce and Brannick which began in 1972-73 and a second one among Pierce, Brannick and appellant which began in April of 1976. On this theory the evidence of the first was not admissible to prove the second.

Pre-conspiracy acts and declarations of co-conspirators are admissible to prove the nature, scope and purpose of the conspiracy charged in the indictment. U. S. Papadakis, 510 F. 2d 287, 294-295, (2nd Cir., 1975); cert. den. 421 U.S. 950 (1975); United States v. Araujo, 539 F. 2d 287 (2nd Cir. 1976); United States v. Colasurdo, 453 F. 2d 585, 591 (2nd Cir. 1971); United States v. Cohen, 489 F. 2d 945, 949 (2nd Cir., 1973).

A reading of those cases reveals that the prior acts testified to were relevant or necessary to prove the conspiracy at trial. Thus in Colasurdo and Papadakis, supra, background evidence was necessary to prove the complicated conspiracy on trial. In Cohen, supra, the prior acts were collaterally related to the acts charged and tended to prove them; in Araujo the acts preceeded the conspiracy on trial by one month.**

There was no such correlation or conspiracy here. The conspiracy charged was a simple one of short duration - April 4-8 1976 - a "one-shot" affair. None of this proof which went back to activities three or four years prior was necessary to or relevant to the conspiracy charge. The fact that in 1973 appellant travelled with Pierce and Brannick carrying a valise of oil would not legally tend to prove that in 1976 she did so again. In view of the hiatus of three years the two acts can be regarded only as two isolated instances bearing no relation to each other.

**In Papadakis, proof of accepting bribes from people arrested for narcotics at other times proved the charge of obstructing justice in the commission of narcotic offenses for which the defendants were on trial. In Cohen proof of the use and importation of firearms tended to prove the charge of making false statements to register them for which the defendants were on trial. These cases talk of a broad underlying conspiracy of which the acts for which defendants are on trial are but a part.

In United States v. White, 294 F. 2d 952 (9th Cir., 1961), the Court said that proof of acts one year later was inadmissible as not sufficiently similar and not sufficiently connected in point of time and circumstances as to throw light on intent. What Tira's state of mind was in 1973 would have no bearing on her state of mind in 1976. United States v. Johnson, 513 F. 2d 819; United States v. Bretholz, 485 F. 2d 483 (2nd Cir. 1973); cert. den. 415 U.S. 976 (1973).

Moreover since the testimony of the prior 1973 trip came from co-conspirator Pierce alone it is questionable whether there was sufficient non-hearsay linking appellant Tira to this 1973 trip so as to permit this hearsay evidence against her. United States v. Ganey, 417 F. 2d 1116, 1120 (2nd Cir., 1969).

> "***the problem is not merely one of pigeon-holding, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility." (United States v. Brettholz, supra, at p. 47).

In view of the slight probative value of the evidence surrounding the 1973 trip in contrast to the prejudice resulting to appellant, this evidence in the interest of justice should have been excluded. Rule 403 of the Federal Rules of Evidence.

POINT II:

THE APPELLANT WAS DEPRIVED OF THE RIGHT OF CROSS EXAMINATION OF THE WITNESS PIERCE BY THE COURT'S REFUSAL TO PERMIT INSPECTION OF PRE-TRIAL SERVICES AGENCY FILE AND CROSS EXAMINATION OF THE WITNESS BRACKEN.

Following his arrest and cooperation Pierce was released on a $5,000 personal recognizance bond under the supervision of the Pre-Trial Services in California on certain co itions. He was permitted to return to Arroyo, California where he was to live with his parents and report to Pre-Trial Services in California twice a week. This was on April 5, 1976. On April 21, 1976 Michalah Bracken, Pre-Trial Services officer, reported to Magistrate Cattogio, that Pierce was not living up to the terms of the release and she requested the Court to take some action (Court Exhibit 3, Appendix G).

Although Officer Bracken appeared also before Judge Neaher at a later time requesting to be relieved of supervision of Pierce no action was taken by the government.

For purpose of cross examining adequately counsel for appellant Pierce subpoenaed officer Bracken and the Pre-Trial Services folder. The government moved to quash the subpoena and after the Court examined the file and heard argument the motion was granted. It was the position of the government representing Daniel B. Ryan, Chief Pre-Trial Services officer for the Eastern District, that the file was confidential and not subject to subpoena and that the subpoena should be quashed.***

*** In the Eastern District a Board of Trustees supervises the pre-trial services agency. (18 U.S.C. 3153(b)(c)).

In addition, the Court ruled that the testimony of Officer Bracken would be inadmissible hearsay since she would be reporting what she had been told by a Pre-Trial Services officer in California. The Court also ruled the witness could not be impeached by specific acts of misconduct. Rule 608 (b), Federal Rules of Evidence. On the confidentiality aspect the Court ruled that under the statute 18 U.S.C. 3154, the facts obtained by Pre-Trial Services might not be used in the issue of guilt. (Tr. 103-125, 288-296; 316-320; 336-39; 344-46; 353; 418-424; 492-93; 509-515; 794).

The Court upon examining the file stated that there was nothing in there which might assist counsel in cross examination and on that ground as well as on the ground of confidentiality and the other grounds herein stated, denied counsel permission to view the file or examine Officer Bracken.

During his direct testimony the United States Attorney asked Pierce about the conditions of his release. (Tr. 336-339; 344-46; 353). The witness denied violating the terms of his release and so did Agent Trustey (the D.E.A. agent in charge of the case who had debriefed the witness). At this point the Court stated that the issue of the witness' credibility on this had now been joined. On cross examination Pierce maintained that he had not violated the terms of his release and counsel was bound by his answer. In the government's summation the U.S. Attorney pointed out that if the witness

had in fact violated the terms of his release his Bond would have been revoked (Tr. 794).

It was appellant's counsel's contention, then and now, that because the witness was cooperating the government had done nothing about investigating or terminating his release for violation of the terms and that he was receiving favors from the government in exchange for his testimony, and that the fact of the violation of the terms of his release tended to show that he was unreliable as well.

In short counsel for the defense argued that she should have been permitted full scope on the question of the witness' credibility on these two elements.

The testimony and evidence sought met the criteria defined in United States v. Miller, 411 F. 2d 825, 832 (2nd Cir., 1969), quoted with approval in United States v. Sperling, 506 F. 2d 1323 (2nd Cir., 1974) which is whether:

> "There was a significant chance that this added item, developed by skilled counsel..., could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

The facts in Miller like the facts before us involved favors flowing between the witness and the government reflecting a rapport between the two.

The Pre-Trial Services Agency was enacted in Title 2 of the Federal Speedy Trial Act, Title 18, Sections 3152-3155. Court's Exhibit 2 (Appendix F) entitled "Statement of General Policy as to Functions and Procedures of the Pre-Trial Services Agency for the United States District Court, Eastern District of New York" sets forth the functions of and the regulations

the
governing/Pre-Trial Services Agency in the Eastern District.

Regulation 2:2 provides that information shall not be admissible "on the issue of guilt in any judicial proceeding"; Regulation 2:3 that pre-trial services officers and agency files and reports should not be subject to subpoena, except in accordance with regulations regarding release of information. The regulations list the instances in which information shall be released. Thus Regulation 2:7 permits release to the Probation Department for preparation of a pre-sentence report with the consent of the defendant in writing upon advice of counsel. Regulation 2:8 makes available details as to defendant's whereabouts without identifying the source, to law enforcement agencies, but only to investigate his failure to appear in Court and (b) "to investigate alleged violations of release conditions". Regulation 2:9 prevents disclosure of information to law enforcement agencies on the issue of defendant's guilt for an offense allegedly committed during the pre-trial release.

It is these regulations upon which the Government and the Court relied to quash the subpoena.

The defendant contends that the regulations as interpreted by the Court are unenforceable and illegal and discriminatory in that they appear to waive their secrecy for law enforcement purposes while depriving a defendant of adequate cross examination of a co-defendant who enjoys the privileges of pre-trial services release.

The office of the General Counsel of the Administrative Office of the U.S. Courts has prepared a memorandum opinion entitled "Confidentiality of Pre-Trial Services Agencies Information" attached herewith as an Exhibit to this Memorandum of Law. In this memorandum General Counsel explains the purpose of the confidentiality urged as being to encourage a defendant to be frank and candid yet at the same time to protect his 5th Amendment rights against self-incrimination by disclosing further criminal activity.

Assuming that to be a proper and lawful reason for secrecy, it is clear that the purpose for which defense counsel sought disclosure of the file and information respecting the witness Pierce had nothing to do with his prior criminal activity, but rather with actions of the witness discovered after he had been released and related to the purpose of establishing his reliability. According to the General Counsel a client receives no immunity for future criminal activity and in fact such criminal activity may be reported to law enforcement agencies

by the Pre-Trial Services;(see page 9 of the memorandum, supra,) In his discussion on impeachment the General Counsel does go on to state that under Brady a co-defendant has no right to information of the testifying defendant who has been released under the jurisdiction of the Pre-Trial Services Agencies. In his memorandum he cites several cases wherein a defendant has sought access to pre-sentence reports of a testifying co-defendant. United States v. Walker, 491 F. 2d 236, 238 (9th Cir., 1974), cert. den. 416 U.S. 990 (974) was just such a case. See also U.S. v. Evans, 454 F. 2d 813 (8th Cir. 1972); U.S. v. Greathouse, 484 F. 2d 805 (7th Cir., 1973).

There is a substantial difference between a pre-sentence report and a pre-trial release report, in that while the former may affect a witness' future for some time to come after sentence, the pre-trial release report is mooted once the witness is sentenced; and there would no longer appear a need for secrecy.

The difference between the information sought in those cases and that sought herein was that in those cases a defendant sought information from the pre-/sentence report of the testifying co-defendant directly relating to the crime on trial in the hope of finding some evidence which tended to exonerate the defendant. Here the information is sought not for the purpose of exonerating the defendant or proving or disproving the crime

on trial but for the purpose of discrediting the witness.

It is submitted that the answer to the question presented by counsel's subpoena lies in the decision of this Circuit in U.S. v. Miller, supra.

Without access to the file and without the opportunity to obtain information from the witness Bracken concerning Pierce's violations of the release conditions counsel for the appellant was unable to properly cross examine the witness Pierce, bound as she was by his answer.*

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* (There was no point in subpoening the pre-trial service officer in California since the result would have been the same, that is, he or she would have claimed confidentiality in the same way that Officer Bracken did.

CONCLUSION

The jury did acquit appellant of the two counts in which she was charged jointly with Pierce and Brannick with possession and importation of hashish oil on April 4th and with aiding and abetting them.

It is not unreasonable to conclude that if the evidence of the activities in 1972 and 1973 had not been brought to the attention of the jury and if the additional evidence relating to Pierce's untrustworthiness as a witness had been brought to their attention, this might have proved sufficient to create a reasonable doubt in the minds of the jurors and thus avoided the conviction of the appellant Tira. United States v. Agurs, 44 U.S.L.W. 5013 U.S. June 24, 1976.

For the above stated reasons the conviction should be set aside.

Dated: December 17, 1976

Respectfully submitted,

HELENA PICHEL SOLLEDER
Of Counsel

Memorandum on

Confidentiality of Pretrial Services Agencies Information*

In an effort to "reduce the likelihood that defendants released pretrial will commit a subsequent crime before trial commences,"[1] Congress included in the Speedy Trial Act of 1974[2] Title II which, on a demonstration basis, establishes a mechanism for selection of pretrial release options for defendants and for closer supervision of released defendants.[3] The mechanism therein provided was the creation, in ten federal district courts of a pretrial services agency. Five of these agencies are to be administered by the Division of Probation of the Administrative Office[4] and five are to be supervised by

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1 / S. Rep. No. 93-1021, 93rd Cong., 2d Sess. 52 (1974) [hereinafter referred to as Senate Report].

2 / Pub.L.No. 93-619, 88 Stat. 2076, 18 U.S.C. §§3152 et. seq., 3161 et. seq., (Jan. 3, 1975). The Speedy Trial Act is comprised of two titles, the first of which imposes time limitations on the scheduling of criminal cases, so as "to assure a speedy trial." 18 U.S.C. §3161(a). Title II of the Act amends Chapter 207 of Title 18 which pertains to the release of persons held in custody pending trial, appeal, or other judicial proceedings. 18 U.S.C. §§3152 et. seq.; see 18 U.S.C. §§3154 et. seq. (1970). [References to the Speedy Trial Act will to its codified form only.]

3 / 18 U.S.C. §3152. These agencies are "authorized to maintain effective supervision and control over, and provide supportive services to, defendants released under this chapter [Chapter 207, Title 18]." Id.

4 / 18 U.S.C. §3153(a).

* Prepared by the Office of the General Counsel of the Administrative Office of the U.S. Courts.

a Board of Trustees of seven members to be appointed by the respective chief judge of a designated demonstration district.[5/] Section 3154 of Title II of the Speedy Trial Act denominates the functions and powers of the pretrial services agency.

Section 3154(1) specifically empowers a pretrial services agency to "collect, verify and report promptly to the judicial officer" information[6/] relevant to the pretrial release of an accused person.[7/] It was Congress's intent that the

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5/ 18 U.S.C. §3153(b),(c).

6/ As used in this statement of policy, the terms "information" or "agency information" refer to data and statements contained in pretrial services agency files and in agency reports, as well as any facts or circumstances which may become known to a pretrial services officer while engaged in the course of a pretrial services investigation or which may be divulged during a bail hearing. See 18 U.S.C. §3154(1); Model Regulations with Respect to Confidentiality, Pretrial Services Agencies, prepared by the Office of General Counsel, Administrative Office of the United States Courts, November 20, 1975 [hereinafter referred to as Model Regulations].

7/ Because of the critical importance of this subsection with regard to the issue of confidentiality, §3154(1) is set forth in full in Appendix A.

Brief mention of another subsection, 3154(8), should be made. One of the functions of the pretrial services agency is to:

> "(8) Prepare, in cooperation with the United States marshal and the United States attorney such pretrial detention reports as are required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial."

information to be compiled by a pretrial services agency would be used by a court to reach informed bail determinations and provide meaningful supervision of persons awaiting trial.[8] Given that purpose, the pretrial services agencies are not designed to serve as law enforcement bodies, but rather to serve as adjuncts of the court.

The most critical source of pretrial services agency information is, of course, a defendant. Yet, an accused person understandably would be reluctant to participate in a pretrial services program if the information he provided could be used to incriminate him or be utilized to further criminal

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7/ (cont'd)
Fed.R.Crim.P. 46(g) requires the attorney for the Government to make a biweekly report to the court listing each defendant held in custody in excess of ten days with a statement of reasons for his continued detention. In practice this is merely a statistical report listing the name of each detainee and the reason, for example a court order or inability to raise bail, why custody continues. Sharing of personal information or of agency files with the U.S. Attorney is not contemplated or permissible.

After receiving such a list, a court may request the pretrial services agency to develop a satisfactory bail release program, if appropriate, for such detainees. Compilation of these reports may also aid the Pretrial Services Unit, Division of Probation, to prepare, for the Director of the Administrative Office, the annual reports and the final 1979 comprehensive report on detainees which are required for submission to Congress by 18 U.S.C. §3155(a),(b).

8/ Senate Report at 24-25.

investigations.[9] Congress drafted several confidentiality provisions in Section 3154(1) to assuage that presumed reluctance of an accused to speak with "candor and truthfulness" in bail interviews.[10] The provisions provide that pretrial services agency information (a) shall be used solely for purposes of a bail determination, (b) shall otherwise be confidential, but (c) may be given per local regulation to certain specified persons, (d) shall not be admissible on the issue of guilt in any judicial proceeding, but (e) may be used per local regulation on the issue of guilt for a crime committed in the course of obtaining pretrial release.[11]

The candor that these provisions were designed to encourage raises the possibility that an accused may provide self-

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9 / Senate Report at 52. Much the same argument, that open access to, and use of, government reports will close off information sources, has been made with respect to non-disclosure of presentence reports. See, e.g., Baker v. United States, 288 F.2d 931, 933 (4th Cir. 1968); United States v. Daniels, 219 F.Supp. 1061, 1063-64 (E.D. Ky. 1970); Parsons, "The Presentence Investigation Report Must be Preserved as a Confidential Document," 28 Fed. Prob. 3 (Mar. 1964). But see Hall v. United States v. Johnson, 395 F.2d 377, 379 (4th Cir. 1968); United States v. Brown, 470 F.2d 285, 288 (2d Cir. 1972); Lehrich, "The Use and Disclosure of Presentence Reports in the United States," 47 F.R.D. 225 (1969).

10 / Senate Report at 52.

11 / 18 U.S.C. §3154(1).

incriminating information. That possibility immediately spawns concern that investigatorial and prosecutorial use of pretrial services agency information might jeopardize one of the constitutional protections provided an accused person by the Fifth Amendment.[12] It is critical to evaluate that concern, prior to discussing the practical application of the above-mentioned statutory directives, inasmuch as this statute would be unconsitutionally applied if it operated in a manner that abridged a person's Fifth Amendment right against self-incrimination.[13]

The Fifth Amendment to the Constitution requires, among other things, that a person not be compelled to respond to question(s) in any civil or criminal proceeding whenever the answer(s) might tend to subject him to criminal responsibility[14]

12/ U.S. Const. Amend. V.

13/ See Kastigar v. United States, 406 U.S. 441, 449 (1972); Glickstein v. United States, 222 U.S. 139, 142 (1911); Counselman v. Hitchcock, 142 U.S. 547, 585 (1892). It is axiomatic that a statute is presumed to be constitutional and where possible should be so construed. United States v. Gambling Devices, 346 U.S. 441, 448-50 (1953); 2A Sutherland, Statutory Construction §45.11 (4th ed. Sands 1973). Accordingly, the endeavor here is to interpret this statute so that it will be constitutional.

14/ U.S. Const. Amend V.; Lefkowitz v. Turley, 414 U.S. 70, 77-78 (1973); McCarthy v. Arnstein, 266 U.S. 34, 40 (1974).

The crucial question here is whether a defendant's participation in a pretrial services interview is compelled within the intended meaning of the Fifth Amendment. For purposes of the Fifth Amendment, a statute may compel the production of inculpatory information if it, albeit not explicity coercive, "needlessly encourages" the relinquishing of the Fifth Amendment privilege.15/ In particular, a person is "compelled" to provide information if he is confronted with a situation in which he must forego his Fifth Amendment privilege in order to exercise another constitutional right.16/ In essence,

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15/ United States v. Jackson, 390 U.S. 570, 583 (1968). In Jackson the Federal Kidnapping Act, as then written, 18 U.S.C. §1201(a), provided that a defendant who pled guilty, or who abandoned his Sixth Amendment right to a jury trial, was assured that the death penalty, upon conviction, could not be imposed. The court found that the "inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter the Sixth Amendment right to demand a jury trial." Id., 390 U.S. at 581. Such inducement was held to burden impermissibly the exercise of constitutional rights. Id., 390 U.S. at 583.

16/ Id; Simmons v. United States, 390 U.S. 377, 390-91, 394 (1968); Davis v. Wainwright, 342 F.Supp. 39, 42-43 (N.D. Fla. 1971), aff'd, 469 F.2d 1405 (5th Cir. 1972). In Simmons the defendant "voluntarily" testified in support of a motion to suppress evidence on Fourth Amendment grounds. The Court found that since the defendant justifiably believed his testimony was necessary to establish his standing to raise the Fourth Amendment question, his testimony was an integral part of his Fourth Amendment exclusion claim, and in that context not "voluntary.". Consequently, his testimony could not be used to incriminate him at trial. In Davis the defendant testified in a pretrial proceeding, seeking, on a claim of indigency, to have counsel appointed for him. Because he was attempting to exercise his Sixth Amendment

one constitutional right should not have to be surrendered in order to assert another.[17]

Technically, an accused's participation in the pretrial services program is voluntary.[18] Yet the refusal to participate may deny to a judicial officer relevant information regarding a defendant's qualifications for bail. The judge may draw adverse inferences from the absence of such information and as a result impose less favorable release conditions.[19] That being the case, a defendant could justifiably believe that providing information to a pretrial services officer is necessary to effectuate his Eighth Amendment right not to be subject to excessive bail.[20]

Hence, a real compulsion is inherent in placing a defendant in the position of having to choose between the exercise of

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16/ (Cont'd)
right to counsel, the court ruled that it was constitutionally impermissible to use his testimony at trial. See generally Garrity v. New Jersey, 385 U.S. 493, 496-500 (1967); Clutchette v. Procunier, 497 F.2d 809, 825-26 n.23 (9th Cir. 1974).

17/ Id.

18/ Neither the Act nor its legislative history expressly indicates that a defendant's participation in the pretrial services program is mandatory.

19/ Such realities were discussed at a Pretrial Services Agencies implementation conference for the Northern District of Illinois on October 2, 1975.

20/ U.S. Const., Amend. 8; Stack v. Boyle, 342 U.S. 1, 5-6 (1951).

his Eighth Amendment right not to be subject to excessive bail and his Fifth Amendment right against self-incrimination. Such a "Hobson's Choice," were it to exist, would be intolerable.22/ It seems clear that a defendant's participation in a pretrial services interview is not voluntary, but compelled within the intended meaning of the Fifth Amendment. The question then is whether his testimony, so compelled, can be used against him to incriminate him.

If §3154(1) is to be constitutionally construed, the immunity it grants to a defendant must be as broad in scope and effect as the Fifth Amendment privilege.23/ Specifically, the statute must convey "use immunity"24/ to a defendant, assuring him that his answers, or any fruits therefrom, cannot be used against him in any state or federal criminal prosecution.25/

The full scope of "use immunity" is worthy of further comment. Use immunity encompasses any crimes committed in

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21/ See Jackson, supra, 390 U.S. at 583; Simmons, supra, 390 U.S. at 390-91, 394.

22/ See Simmons, supra, 390 U.S. at 389, 394.

23/ See note 13 supra.

24/ U.S. Const., Amend V; Lefkowitz, supra, 414 U.S. at 77-78 (1973); see Kastigar, supra, 306 U.S. at 453; Malloy v. Hogan, 378 U.S. 1, 8 (1964); Brown v. Walker, 161 U.S. 591, 614 (1896); Kelly v. United States, 464 F.2d 709, 712-13 (5th Cir. 1972); 18 U.S.C. §6002 (1970). For a distinction between use and transactional immunity, see Kastigar, supra, 406 U.S. at 448-459; Kelly, supra, 464 F.2d at 712 n.8.

25/ Murphy v. Waterfront Commission, 378 U.S. 52, 78-80 (1964).

the past about which a person is asked to speak.[27] In other words, immunity extends to all crimes previously committed about which information is given, but does not extend in futuro, such as to crimes which a defendant is contemplating. Accordingly, a pretrial services officer is free to report information pertaining to potential crimes to law enforcement agencies. Furthermore, the Fifth Amendment privilege protects a defendant from prosecution for acts of perjury[28] or false statement,[29] about which he gives information, which acts are committed prior to the period of immunity granted by

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26/ Glickstein, supra, 222 U.S. at 142; Brown v. Walker, 161 U.S. 591, 607-608 (1896); United States v. Tramunti, 500 F.2d 1334, 1342 (2d Cir. 1974), cert. denied, 419 U.S. 1079 (1974); U.S. v. Bryan, 339 U.S. 323, 338-44 (1950).

27/ In re Baldinger, 356 F.Supp. 153, 162 (C.D. Calif. 1973).

28/ Perjury consists of a person's falsely testifying under oath that he will testify truthfully and is proscribed by 18 U.S.C. §1621 (1970). A related crime for false declarations made under oath before a grand jury or court is found at 18 U.S.C. §1623 (1970).

29/ The crime of making false statements is stablished in 18 U.S.C. §1001 (1970). 18 U.S.C. §100 refers to the making of false statements with respect to matters within the jurisdiction of a federal agency or department. Federal courts are "agencies" for purposes of this statute United States v. Bramblatt, 348 U.S. 503, 509 (1955); United States v. Stephens, 315 F.Supp. 1008, 1010 (W.D. Okla. 1970); see Baldinger, supra.

statute.30/ However, use immunity does not extend to a defendant who commits perjury, who falsifies or conceals a material fact, or who knowingly makes a false statement in any proceeding before a federal department, agency, or court when such acts occur during or subsequent to the grant of immunity.31/ The explanation for this understanding of the Fifth Amendment is aptly expressed in United States v. Tramunti, supra, 500 F.2d at 1352:

> "If he [a person given immunity] gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breached and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions."32/

Consequently, consistent with the Fifth Amendment, a pretrial services defendant, who is granted use immunity with respect to the information he provides relevant to his qualifications for pretrial release, may be prosecuted for perjury or false statement allegedly committed in the course of obtaining pretrial release.

30/ United States v. Traumunti, supra, 500 F.2d at 1352; Baldinger, supra.

31/ Id.

32/ See also Glickstein, supra, 222 U.S. at 142; Baldinger, supra, 356 F.Supp at 163.

With these constitutional principles in mind, a thorough evaluation of the scope and application of the confidentiality created by the Act is warranted. As previously noted, Congress intended the pretrial services agency to "collect, verify and report promptly to the judicial officer" information relevant to the pretrial release of an accused person. Within the confines of that responsibility, several express statutory caveats, earlier enumerated, are contained: (1) The information is to be used only for the purposes of a bail determination; (2) it shall otherwise be confidential; (3) exceptions to this confidentiality may be created by the Division of Probation or the Board of Trustees, in their respective districts, for disclosure to certain persons specified in the statute; and (4) in no case shall such information be admissible on the issue of guilt in any judicial proceeding although, (5) in their respective districts, the Division of Probation or Board of Trustees may permit such information to be used on the issue of guilt for a crime, such as perjury committed in the course of obtaining pretrial release.

Section 3154(1) first creates a comprehensive rule of confidentiality for pretrial services agency information: Information shall be used solely for the purposes of a bail determination. As a practical guideline, this language limits

the pretrial services agency to gathering bail information. Therefore, a pretrial services agent should advise his "client" that he seeks only data relevant to the defendant's qualifications for release and his need for services during the period preceding trial. The agent is interested in the nature of the charges - i.e., theft on government reservation- but not in "the dope" about the charges.33/

33/ The Bail Reform Act of 1966, 18 U.S.C. §§3141 et seq., sets forth, in §3146(b), the factors to be considered in determining the conditions for release:

"(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings." (Emphasis added.)

It has been suggested that prohibiting the pretrial services agent from questioning a defendant as to an alleged offense will prevent the investigator from contributing to the court the information deemed relevant under §3146(b), in particular that described by the underscored language quoted above. 8A Moore's Federal Practice. §46.06 at 46-43 (2d ed. 1975). While such a provision may well prevent the pretrial services agent from making that kind of contribution, the court already has sufficient resources from the U.S. Attorney's Office, the arresting officer, and even defense counsel, to acquaint himself adequately with the nature and circumstances of the offense charged. The obligation of the pretrial services officer is rather to fulfill the previously unanswered need for verified information about a defendant's background, employment, [illegible], family status, and other relevant factors specified in §3146(b).

The inquiry should not be directed to information which might be incriminating to the defendant at trial. Accordingly, the Model Regulations, which are attached, provide that a pretrial services agent shall not record information or indicate, in any form, matters related to an alleged offense(s).[34/] The "Advice of Rights and Release of Confidential Information" form likewise assures a defendant that he will not be questioned about the details of the offense(s) for which he is then charged.[35/]

The second statutory caveat contained in Section 3154(1) is that, assuming the use of agency information for the purpose of bail determination, such information shall otherwise be confidential. "Otherwise" is not intended as an all-inclusive term, however, for the statute proceeds to provide that the local supervisory body is to establish "policy on the release of agency files."[36/] The policy which may be adopted locally is constrained by the statute, which enumerates one mandatory type of disclosure, and four permissive types

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34/ Model Regulations 1(a)(2) [See Appendix D].

35/ See Appendix B. See also Appendix C.

36/ 18 U.S.C. §3154(1).

of release of agency information.37/ This language, in effect, is the third caveat and provides for exceptions38/ to the admonition that the information is otherwise confidential.

Although the Act provides for certain qualifications of its rule of confidentiality, the legislative history

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37/ One question that has been raised is whether the delegation to the Division of Probation or the Board of Trustees, in their respective districts, of rule-making capability on the issue of confidentiality of agency information contravenes the newly adopted Federal Rules Evidence, Pub.L.No. 93-595, 88 Stat. 1926 (Jan. 2, 1975). The Congress, in approving these evidentiary rules, rejected extremely controversial attempts to delineate specific types of testimonial privileges. Rather the Congress chose to provide that questions of privilege be governed by the principles of the common law as determined on a case-by-case basis by the federal courts. Fed.R.Evid. 501; See 1974 U.S. Code Cong. & Adm. News 7051, 7052-54. Whether this provision deprives the district courts of power to establish rules regarding privileged information is a question unnecessary to resolve here. Congress itself, in §3154(1), has created the privilege of confidentiality for pretrial services agencies; the local supervisory bodies possess only a limited delegation of authority to implement the rule of confidentiality.

38/ A full discussion of the scope of the exceptions provided by the Act follows at p. 15-27.

demonstrates that these limited exceptions to the rule of confidentiality "must comport with the general policy set out in the section."[39] (Emphasis added.) The general policy of the section referred to is contained in the fourth and fifth exhortations, respectively, that in no case shall such information be admissible on the issue of guilt in any judicial proceeding, except that such information may be used on the issue of guilt for a crime committed in the course of obtaining pretrial release.[40] That statutory policy is congruent with the previously discussed constitutional imperative that a defendant must be provided use immunity. It is important to remember that each of the exceptions to the general rule of confidentiality of pretrial services agency information must be constrained within the parameters of that use immunity.

The first of the enumerated exceptions is mandatory in nature:[41] regulations shall create an exception so that

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39/ Senate Report at 52.

40/ 18 U.S.C. §3154(1).

41/ As a rule of statutory construction the word "shall" generally indicates that a statutory provision is mandatory in nature and that there is intended no discretionary application of the statute. Escoe v. Zerbst, 295 U.S. 390, 493 (1935); Boyden v. Comm'r of Patents, 441 F.2d 1041, 1043 (D.C. Cir. 1971), cert. denied, 404 U.S. 842 (1971); Stanfield v. Swenson, 381 F.2d 755, 757 (8th Cir. 1967). The presumption is that "shall" ordinarily is used in an imperative rather than directive sense; however, the character and context of the legislation are controlling. United States v. Reeb, 433 F.2d 381, 383 (9th Cir. 1970),

information shall be available to members of the agency staff and to qualified persons for the purpose of research related to the administration of criminal justice.42/ This dictate places a premium upon the evolution of improved methods of accommodating the needs of society, as well as of individuals, in the administration of the criminal justice process. Hopefully, the more that is known about the participants in that process the more responsive and streamlined that process will become. Apparently, this policy motivated the Congress to override the "otherwise confidential" rule and opt for research access to agency information. Several cautionary observations are necessary, however:

(1) Because the value of the research is not dependent on the identity of the subject of a pretrial services agency

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41/ (cont'd) cert. denied, 402 U.S. 912 (1971); Thompson v. Clifford, 408 F.2d 154, 158-59 (D.C. Cir. 1968); see 2A Sutherland, supra, note 13, at §57.03. Both the legislative history of §3154(1) which focuses on the need for candor and the textual emphasis on non-disclosure indicate that the normal imperative sense of "shall" in the phrase "shall otherwise be confidential" is intended. Likewise the legislative history and the textual juxtaposition of "shall" and "may" with regard to the several exceptions to the rule of confidentiality reaffirm the view that "shall" is used in a mandatory sense whereas "may" is used in a permissive manner. See Federal Land Bank of Springfield v. Hansen, 113 F.2d 82, 83-84 (2d Cir. 1940); Senate Report at 52.

42/ 18 U.S.C. §3154(1). The nature of the research envisioned by the provision "related to the administration of criminal justice" is not defined by statute. This determination apparently is left to the discretion of each local supervisory body, who must also determine which persons are qualified to perform such research. In

investigation, the anonymity of the individuals to whom such information relates should be preserved.

(2) The completion of non-disclosure agreements by the researchers, as well as other conditional restrictions on research access, should be required to guarantee the confidentiality of agency information.

The remaining exceptions which can be adopted by the local supervisory body are permissive in nature - that is, they may be adopted within the discretion of the local district body.[43/] The first of the discretionary exceptions permits access to agency files by "agencies under contract pursuant to paragraph (4)" of §3154.[44/] These agencies

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42/ (cont'd)
reaching those determinations it is crucial that a means be found to prevent the improper disclosure of pretrial information released pursuant to this section. It is expected that each district will develop an appropriate policy to achieve that end. The Administrative Office of the United States Courts has not resolved this problem at this time.

43/ See note 41 supra.

44/ 18 U.S.C. §3154(1). Subsection (4) of §3154 provides that the pretrial services agency shall:

> "(4) With the cooperation of the administrative Office of the United States Courts and with the approval of the Attorney General, operate or contract for the operation of appropriate facilities for the custody or care of persons released under this chapter including, but not limited to, residential halfway houses, addict and alcoholic treatment centers, and counseling services."

are to serve as facilities for the custody and care of released persons awaiting trial -- e.g., halfway houses, narcotics and alcoholic treatment centers, and counseling services. The need for such agencies' access to the pretrial services agency files is obvious, yet anonymity of the subjects is by definition impossible. However, social services agencies, as these contract agencies will be, adhere to a professional ethic of confidentiality.45/ Consequently, utilization of agency information by these professional agencies should not conflict with the confidentiality rule. Nevertheless, to ensure the confidentiality of agency information and yet promote effective care and custody facilities, the Model Regulations permit disclosure to contract agencies upon the condition that such agencies execute non-disclosure agreements, binding themselves to maintain the confidentiality of such information. In addition, the regulations provide that neither a contract agency, its records, or its personnel shall be subject to subpoena concerning information regarding any defendant which is obtained from pretrial services agents.46/

45/ See "The Presentence Investigation Report," Publication No. 103, Administrative Office of the United States Courts, at 4 (1965); Barnett & Cronewald, "Confidentiality of the Presentence Report," 26 Fed. Prob. 26, 29-30 (March 1962). See generally Annotation, Communications to Social Worker As Privileged, 50 A.L.R. 3rd 563 (1973).

46/ Model Regulations 4(a)(b); see discussion, infra, at p. 29-34, regarding immunity from judicial process.

The second of the permissible regulations would allow dissemination of agency files to probation officers for the preparation of presentence reports.[47] Fed.R.Crim.P. 32(c)(1) requires that in almost every case, before sentence is imposed, a presentence report be prepared and presented to the court to better inform the court's exercise of its sentencing judgment.[48]

> "The primary objective of the presentence report is to focus light on the character and personality of the defendant, to offer insight into his problems and needs, to help understand the world in which he lives, to learn about his relationships with people, and to discover those salient factors that underlie his specific offense and his conduct in general. It is not the purpose of the [presentence] report to demonstrate the guilt or innocence of the defendant."[49]

47/ 18 U.S.C. §3154(1).

48/ The Rules of Criminal Procedure were recently amended by Pub.L.No. 94-64, 89 Stat. 370, Aug. 1, 1975. Significant changes pertaining to the preparation and use of presentence reports were included in these amendments which will become effective December 1, 1975. The new Rule 32(c)(1) makes "clear that such a report ought to be routinely required . . . ." Advisory Committee Notes on the Proposed Amendments to the Federal Rules of Criminal Procedure, Advisory Committee on Criminal Rules, Judicial Conference (1974).

49/ Publication No. 103, supra note 46, at 1.

The quoted language demonstrates the coincidence of information germane to a bail determination inquiry and that pertinent to a presentence investigation. Sharing of such information would seem an efficient way of lightening the burdens of the probation service, avoiding duplication, of effort, and allowing more time to be spent in consultation, counseling, and providing services. Moreover, this use of agency information is only an intra-court use. Probation officers are court personnel who are schooled in dealing with confidential information. Disclosure to them for revelation to the court permits better use of court resources without permitting extra-judicial access to agency information. Secondly, disclosure of presentence reports is strictly governed by Fed.R.Crim.P. 32(c)(3), as recently amended, which permits only limited access to such reports at the time of sentencing by defendants and/or their counsel and the attorney for the Government.50/ Presentence reports are not otherwise available to a defendant, a prosecutor or any third parties, i.e., they are not public records but

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50/ Fed.R.Crim.P. 32(c)(3) (1975).

rather belong to the court.[51] Accordingly, the Model Regulations elect that such disclosure -- to probation officers for the purpose of compiling presentence reports -- be permitted.[52] It is expected, however, that a probation officer would use agency files upon a reciprocal understanding that he not divulge agency information to any person or agency outside of the sentencing court and that he use the information solely for the purpose of preparing a presentence report.[53]

The third permissive exception to the confidentiality rule is quite ambiguous. It permits, in the discretion of the local supervisory body, access to agency information "in certain limited cases to law enforcement agencies for law enforcement purposes."[54] It is unclear to what the phrase "limited cases" refers: for example, whether it means

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51/ United States v. Greathouse, 484 F.2d 805, 807 (7th Cir. 1973); United States v. Evans, 454 F.2d 813, 820 (8th Cir. 1972), cert. denied, 405 U.S. 969 (1972); United States v. Daniels, 319 F.Supp. 1061, 1063-64 (E.D. Ky. 1970); Hancock Bros., Inc. V. Jones, 292 F.Supp. 1229, 1232-34 (N.D. Calif. 1968); United States v. Greathouse, 188 F.Supp. 765 (M.D. Ala. 1960); United States v. Durham, 181 F.Supp. 503, 503-04 (D.D.C. 1960), cert. denied, 364 U.S. 854 (1960).

52/ Model Regulations 5.

53/ Id.

54/ 18 U.S.C. §2154(1).

that agency information could be used to investigate offenses allegedly committed subsequent to the trial on pending charges, whether it means that such information could be used solely for investigations of offenses supposedly committed while a defendant is on bail, or whether it means agency information could be used to investigate perjury allegedly committed in the course of obtaining bail.

It is axiomatic that in construing ambiguous statutory language, such as this, an interpretation which harmonizes with legislative intent is to be achieved.[55/] Resort to the legislative history, the objectives of the statute as a whole, and the context in which the unclear wording appears are guides to determining the legislative intent.[55/] These principles establishes that the language of the third exception could not have been intended to authorize use of agency information for furthering any subsequent criminal investigation

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55/ Where the language of a statute is clear and unambiguous on its face, there is no need for, and a court should not resort to, an examination of legislative history in order to construe a statute. But, where the words of a statute are equivocal in meaning, a court must resort to other aids, such as the statute's legislative history, to reach a construction that comports with the legislative intent. United States v. Public Utilities Commission of California, 345 U.S. 295, 315 (1953); United States v. Universal C.I.T. Credit Corp., 344 U.S. 219, 221 (1952); Sealand Service, Inc., v. Federal Maritime Commission, 404 F.2d 824, 828 (D.C. Cir. 1968); American Bankers Insurance Co. of Florida v. United States, 255 F.Supp. 67, 70 (D. Fla. 1967), aff'd 383 F.2d 304, 305 (5th Cir. 1968); 2A Sutherland, supra, note 13, at §45.02.

of the accused. Such use of agency information would conflict with Congress's intent, since it would inhibit, not encourage, "candor and truthfulness by the defendant in bail interviews."[56] Moreover, the ambiguous language, read in conjunction with the caveat that agency information shall not be admissible on the issue of guilt in any judicial proceeding,[57] buttresses the interpretation that Congress did not contemplate or authorize open-ended investigative and prosecutorial use of agency information.

A plausible meaning for this equivocal language can be gleaned from the legislative history.[58] An important rule of thumb proffered in the Senate Report is:

56/ Senate Report at 52.

57/ 18 U.S.C. §3154(1). In expounding a statute, a court must not be guided by a single sentence or member of sentence, but must look to provisions of the whole law, and to its object and policy. Richards v. United States, 369 U.S. 1, 11 (1962); N.L.R.B. v. Lion Oil Co., 352 U.S. 282, 288 (1957). The task is to give an act the most harmonious comprehensive meaning possible in light of legislative policy and purpose. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 631-632 (1973).

58/ It is a maxim of statutory construction that all words and provisions of a statute are intended to have meaning, and are to be given effect, and should not be construed as mere surplusage, United States v. Menache, 348 U.S. 528, 538-539 (1955); Wilderness Society v. Morton, 489 F.2d 842, 856 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973); Consolidated Flour Shipments - Bay Area v. Civil Aeronautics Board, 205 F.2d 449, 450 (9th Cir. 1953); 2A Sutherland, supra, note 13 at §46.06.

> "As a general rule the agencies' files should only be used in initial bail hearings, and in subsequent hearings where there is an apparent violation of release conditions." 60/ (Emphasis added.)

The Senate Report also indicates that Title II is based upon the experience in the District of Columbia Bail Agency.60/ Under the District of Columbia Bail Agency Act61/ agency information may be used by law enforcement agencies for investigation of a defendant's failure to appear in court or for trial, offenses allegedly committed while on bail or during release, and for suspected violations of release conditions.62/ The pretrial services agency shares with the court, as the court's agent, two obligations to the public: to ensure that those persons who are released pending trial do not commit offenses in the interim before trial; and to superintend releasees in order to guarantee their court appearance.63/ Utilization of agency information to investigate

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60/ Id. at 51-52.

61/ D.C. Code §§23-1301 et seq. (1973).

62/ D.C. Code §23.1303(d) (1973); see Cowan v. United States 331 A.2d 323, 326 (D.C. Ct. App. 1974).

63/ The predominant justification proffered for Title II was that of minimizing the occurrence of crimes committed while on bail. Indeed the thrust of the Speedy Trial Act as a whole is aimed at trimming recidivism rates. See H.R. Rep. No. 93-1508, 93d Cong., 2d Sess. 8, 15-16, (1974); Senate Report at 24-25.

a defendant's alleged failure to appear, alleged violations of bail release conditions,[64] and offenses supposedly committed while on bail would help meet this responsibility. On the other hand, once agency information is released for these confined purposes, the confidential nature of that information is violated. The identity of confidential sources would be revealed to law enforcement bodies who could use such information for other purposes. In any event, a defendant's confidence in the pretrial services agency's promise of confidentiality would be undermined. Hence, in an effort to meet these conflicting policies, the Model Regulations provide that agency information may be divulged to law enforcement agencies to investigate violations of release conditions, failure to appear, and crimes supposedly committed while on bail, but only as to the whereabouts of a defendant without identifying the source of such information.[65] N.B.

The last sentence of §3154(1) creates the final permissive exception to the confidentiality rule, but in doing so it states one of the most critical expressions of legislative intent:

> "In no case shall such information be admissible on the issue of guilt in any judicial proceeding, and [but] in their respective districts, the Division of

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64/ D.C., a subsequent bail jumping hearing per 18 U.S.C. §3150 (1970).

65/ Model Regulations 6.

> Probation or the Board of Trustees may permit such information to be used on the issue of guilt for a crime committed in the course of obtaining pretrial release."66/ (Emphasis added.)

As previously discussed, the opening clause of this sentence read in conjunction with the statute as a whole, grants "use immunity" protection to defendants - i.e., the information provided by defendants in bail interviews, as well as any fruits thereof, will not be available for use in investigating or prosecuting any state or federal criminal offense.67/

The imprecise language "for a crime committed in the course of obtaining pretrial release," makes the intended meaning of this permissive exception to the rule of confidentiality unclear. The legislative history indicates that the language contemplated use of agency information for the purpose of perjury prosecutions.68/ As stated supra, the use of agency information in a perjury or false statement prosecution would not impair the use immunity granted to defendants in §3154(1). The Model Regulations include a a provision for such a use because the denial of immunity

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66/ 18 U.S.C. §1354(1).

67/ See Murphy, supra note 25.

68/ See Senate Report at 50.

o a defendant for providing false information with regard to his bail determination is vital to ensure the integrity of the judicial process and the pretrial release program.69/

The preceding discussion concludes an examination of the express language of §3154(1). Implicit in §3154(1), however, are some additional limitations on the use of agency information. First, the Senate Report suggests that agency information may be used for impeaching a defendant's credibility in any subsequent proceeding if the local supervisory body so decides.70/ This view, however, would seem to subvert the express statutory language that such information is to be used solely for bail determination purposes.71/ Furthermore, attacking a defendant's credibility with pretrial services information would likely influence the issue of guilt, a use of the information which the statute expressly proscribes. For these reasons, the Model Regulations provide that agency information shall not be available for impeachment purposes.72/

69/ Model Regulations 7.

70/ Senate Report at 52. The wording "any subsequent proceeding"apparently refers to any proceedings which might arise out of a new or different alleged offense. See generally Cowan, supra, 331 A. 2d at 326.

71/ 18 U.S.C. §3154(1). See discussion supra, at pp. 11-13.

72/ Model Regulations 9.

Second, because the bail determination is a judicial decision affecting a person's right, albeit conditional, to liberty, due process seems to require that a defendant be shown the factual portion of a pretrial services agency report in order that he may challenge its assertions and uncover erroneous statements.73/ The Model Regulations provide accordingly, with discretion vested in the court to excise information which would reveal the identity of confidential sources.74/ Because of the possibility that such information might be used in preparation for trial, no provision is made for revelation of agency information to the attorney for the Government at the bail hearing.

Third, Brady v. Maryland, 373 U.S. 83, 87 (1973), requires that any exculpatory information within the domain of the prosecutor be divulged to an accused. Court records, such as pretrial services agency information, are not available to a prosecutor, and thus would not be subject to the Brady rule. Consequently, no criminal defendant would be able to "discover" the information in an agency report

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73/ Cf. Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973); Morissey v. Brewer, 408 U.S. 471, 480-82 (1972); Kelly v. Goldberg, 397 U.S. 254, 262-64, (1970). See also Fed.R.Crim.P. 32(c)(3)(A),(B); United States ex rel. Brown v. Rundle, 417 F.2d. 282, 284-85 (3d Cir. 1969).

74/ Model Regulations 8.

as "exculpatory information."[75] Also, a co-defendant has no right to such information for use in impeaching a defendant if he testifies against a co-defendant, in that Brady does not require divulgence of non-prosecutorial information.[76] Brady concerns only prosecutorial suppression of evidence crucial to a defendant's case.

Fourth, where the confidentiality mandated by §3154(1) is complete, a means must be established to guarantee the promise of confidentiality.[77] Inherent in the language of §3154(1)--that pretrial services information is to be used solely for a bail determination, shall otherwise be confidential, and shall not be used on the issue of guilt in any judicial proceeding, except possibly in a prosecution for perjury or false statement committed in an effort to obtain bail-- is a recognition that neither a pretrial services officer, nor the files or reports of the agency are subject to subpoena, except as is consistent with the limited exceptions to confidentiality locally established.

75/ In a similar situation involving presentence reports, it has been held that the Brady rule is inapplicable. United States v. Walker, 491 F.2d 236, 238 (9th Cir. 1974), cert. denied, 416 U.S. 990 (1974). See Model Regulations 10.

76/ Cf. United States v. Greathouse, 484 F.2d 805, 807 (7th Cir. 1973); United States v. Evans, 454 F.2d 813, 820 (8th Cir. 1927), cert. denied, 406 U.S. 969 (1972). See Model Regulations 10.

77/ A recent decision in Minnesota, State v. Winston and Douglas, has recognized the need for guaranteeing the confidentiality of pretrial services information. In this case a probation officer testified at trial as to the address given to him at the defendants' bail inter-

The legislative history of Title II supports this construction since it indicates that Congress drafted §3154 in reliance on the District of Columbia Bail Agency Act.[78] In its original version, that Act[79] granted blanket confidentiality for bail investigation information and provided that the bail agency and its officers were immune from subpoena.[80] When later amended, the District of Columbia Bail Agency Act provided for certain limited exceptions to the confidentiality requirement and the original subpoena provision was not carried forward.[81] That deletion reflects the fact that total immunity from subpoena was no longer applicable because of the newly created exceptions to the prior rule of blanket confidentiality. The deletion does not appear to be intended, however, to remove subpoena immunity in circumstances where agency information was to remain confidential.

Additionally, the conclusion that Congress implicitly intended to create immunity from judicial process is in accord

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77/ (cont'd)
view. The court there held that "evidence given to the probation officer [pretrial services officer], serving in the capacity of arranging bail for defendants, cannot be used in prosecution of said defendants," because such a use would only serve to jeopardize the bail program. State v. Winston and Douglas, 300 Miss. 314, 219 N.W.2d 617, 619-20 (1974). [The opinion is attached as Appendix E].

78/ Senate Report at 52.

79/ D.C. Code §§23-901 et seq.(1966).

80/ Id., at §903(c).

81/ D.C. Code §23-1301 et seq. (1973); id., at §1303(d).

with case precedents which have construed similar confidentiality statutes. These cases have established that immunity from process is a necessary incident of a confidentiality statute.82/

The power of a federal statute to grant immunity from process83/ and to enforce such immunity in state and federal courts is likewise well established.84/ In particular, three aspects of this immunity from process are worth noting. First, a state court does not have "the power to control by mandamus or [subpoena] . . . the official discretion of an officer or agent of the United States in his performance of a duty vested in him by a law of the United States.85/ Second, where a statute precludes a federal officer or agent from divulging confidential records, that preclusion

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82/ Tollefsen v. Phillips, 16 F.R.D. 348, 349 (D. Mass. (1954); see Boske v. Commingore, 177 U.S. 459, 467, 471 (1900); Ex parte Shockley, 17 F.2d 133, 137 (N.D. Ohio 1926); In Re Huttman, 70 F. 619, 701-803 (D. Kan. 1895).

83/ See Annotation, "Constitutionality, construction, and effect of regulation relating specifically to divulgence of information acquired by public officers or employees," 165 ALR 1302, 1306 (1946).

84/ The Supreme Court has held that where a federal statute expressly or implicitly provides for immunity, that immunity applies to state, as well as federal, judicial proceedings. Brown, supra, 161 U.S. at 606, 623 (application of a federal statute granting a defendant use immunity.)

85/ Shockley, supra, 17 F.2d at 137; see Ex parte Siebold, 100 U.S. 371, 376, 379 (1879); M'Cluny v. Silliman, 6 Wheat (U.S.) 596, 600 (1821).

also applies to oral testimony of the agent, since to divulge conversations that pertain to the records would be to divulge the contents of the records themselves.[86] Finally, immunity from judicial process applies regardless of whether a federal officer or agent is acting in conformity with a federal statute or in conformity with regulations enacted pursuant to a federal statute.[87]

The authorities cited for these propositions regarding the immunity of federal officers or agents mainly involve the confidentiality of records of the Internal Revenue Service,[88] yet their application is universal. The underlying basis for immunity from process is the fundamental constitutional premise that "the constitution and all laws which shall be made in pursuance thereof . . . shall be the supreme law of the land."[89]

Consistent with the language of the Act, the relevant legislative history, and the general construction of such

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86/ Huttman, supra, 70 F. at 702.

87/ See, e.g., Boske, supra 177 U.S. at 471; Shockley, supra, 17 F.2d at 137; Huttman, supra, 70 F. at 702-703.

88/ See, e.g., Boske, supra; Huttman, supra.

89/ U.S. Const., Art. VI; Siebold, supra, 100 U.S. at 371, 379 (Opinion by Bradley, J.); Huttman, supra, 70 F. at 703.

statutes, the Model Regulations thus provide for a limited immunity from judicial process. 90/ The local regulations which a district adopts will have the force and effect of law.91/ As a result, a pretrial services officer, who is forbidden by local regulation to disclose agency information, cannot be compelled by a state or federal court to divulge information in his custody which he has collected and retained pursuant to his official duties.92/

A fifth and final observation is that the refusal of a pretrial services officer to disclose information to law enforcement agencies about a defendant's past crimes would not make him liable for prosecution for the crime of misprision of a felony.93/ On the contrary, the Federal Criminal

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90/ Model Regulations 1(b).

91/ See note 85 supra.

92/ See note 80 supra.

93/ Misprision of felony, defined in 18 U.S.C. §4 (1970), proscribes the knowing concealment and non-disclosure of the actual commitment of a felony. However, to be liable for misprision, a person must not only fail to timely report knowledge of a felony, but also he must take affirmative action, such as the destruction of evidence, to conceal the crime. See Shennenhouse, "Misprision of a Federal Felony; Dangerous Relic or Scourge of Malfeasance," 4 U. Balto. L. Rev. 59, 65-71 (1974). Consequently, a pretrial services officer who simply fails to reveal inculpatory information in his custody would not be guilty of this crime.

Code penalizes the publication or disclosure by an officer or employee of the United States or of any department or agency thereof of certain kinds of confidential information coming to such officer in the course of his official duties.94/ Furthermore, a federal officer may be subject to tort liability if he discloses information in violation of his statutory duties.95/

In conclusion, Section 3154(1) establishes a program whose viability depends on the near absolute confidentiality of agency information. The Constitution requires that a defendant be cloaked with use immunity with respect to the use of such information. In addition, Congress, to promote frankness by defendants in the bail interview, felt the need to guarantee expressly the confidentiality of agency information. To achieve that end, Congress created in §3154(1), a general rule of confidentiality and also authorized the

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94/ 18 U.S.C. §1905 (1970). Although it is unclear whether this statute applies to court-appointed personnel, its policy warrants caution on the part of pretrial services agents if called upon to reveal agency information. The definition of "department or agency" contained in §6 of Title 18 would seem to exclude the judiciary; however, the words "officer or employee of the United States" generally encompasses court personnel. See 5 U.S.C. §§2104, 2105; 18 U.S.C. §1910. See also Bramblett, supra, 348 U.S. at 509; Stephens, supra, 315 F.Supp. at 1010.

95/ Annotation, supra, note 81, at 1304.

Board of Trustees or the Division of Probation, in their respective pretrial services districts, to establish policy regarding the confidentiality of information. Pursuant to that power, and as a necessary incident of that confidentiality, the Model Regulations provide that agency officers and records are immune from judicial process with regard to the disclosure of agency information. It is significant to note that non-privileged information would be available to law enforcement personnel or other third parties from other sources. Thus there is no compelling reason to violate the statute's rule of confidentiality, or to encroach upon the pretrial services agency's obligation to the court to be a confidential judicial adviser.96/

96/ See Hancock Bros., Inc. v. Jones, supra, 292 F.Supp. at 1232.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

BRADLEY BRANNICK and BARBARA TIRA,

Defendants-Appellants

Docket No. 76 Cr. 1976

AFFIRMATION OF SERVICE

HELENA PICHEL SOLLEDER, an attorney at law, affirms the following under the penalty of perjury:

I am not a party to this action; I am over 18 years of age; I reside at 19 Rector Street, N.Y.

On the 22nd day of December, 1976 I served the within Brief and Appendix for appellant Tira on Elia Weinbach, Esq. Assistant U.S. Attorney for the Eastern District of New York, at 222 Cadman Plaza East, Brooklyn, New York, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: December 22, 1976

Helena Pichel Solleder

HELENA PICHEL SOLLEDER